

Jilaldin bin Mustafa v Tenaga Nasional Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3-22-103 OF 1999
MOHD HISHAMUDIN J
24 MARCH 2004

Civil Procedure — Injunction — Interlocutory injunction — Application to discharge injunction — Grounds for discharge — Delay in prosecuting claim upon obtaining injunction — Whether other grounds to be considered before discharge ordered

This was an interlocutory application by the defendant to discharge an *inter parte* interlocutory injunction, obtained by the plaintiff, on the ground that the plaintiff had not taken any steps towards prosecuting his claim under the suit. The plaintiff had obtained the injunction to prevent the defendant from cutting his electricity supply.

Held, dismissing the defendant's application with costs:

- (1) The court is not obliged to discharge an interlocutory injunction merely by reason of a substantial delay on the part of the party to whom the interlocutory injunction has been granted as there are other considerations as well (see para 15).
- (2) The defendant itself is equally guilty of a delay of four years. Since it has a counter claim against the plaintiff, the defendant itself could have moved the proceeding by filing summons for directions under O 25 r 1(4) of the RHC, soon after the pleadings were deemed to have been closed.
- (3) At the time of filing of encl 20, the delay was no longer continuing. The defendant, by filing Form 63 in April 2003, had put the comatose proceeding back in motion. In fact, after the filing of Form 63, but prior to the filing of the defendant's present application in September 2003, there had already been two hearings of the case management, namely, on 3 June 2003 and on 15 August 2003. The defendant was also guilty of delaying to file encl 20 in absence of any explanation (see paras 22 and 23).
- (4) The defendant did not explain the degree of prejudice suffered in its summons in chambers and affidavits, by the plaintiff's delay. On the other hand the plaintiff has deposed in his affidavit at encl 28 that he will be greatly prejudiced if the injunction is discharged in that the livelihood of 36 workers of his are dependent on the uninterrupted supply of electricity (see para 24).

[Bahasa Malaysia summary]

Ini adalah satu permohonan interlocutori oleh defendan untuk mengetepikan injunksi interlocutori inter parte, yang didapatkan oleh plaintiff, atas alasan plaintiff tidak mengambil apa-apa langkah untuk memajukan tuntutannya di bawah perbicaraan berkenaan. Plaintiff telah mendapatkan injunksi tersebut untuk menghalang defendan daripada memotong bekalan elektriknya.

A Diputuskan, menolak permohonan defendan dengan kos:

(1) Mahkamah tidak perlu mengetepikan suatu injunksi interlokutori hanya atas alasan terdapat kelewatan daripada pihak yang telah mendapatkan injunksi interlokutori tersebut kerana terdapat faktor-faktor yang juga perlu dipertimbangkan (lihat perenggan 15).

B (2) Defendan juga bersalah kerana kelewatan selama empat tahun. Dari masa tuntutan balasnya dibuat terhadap plaintif, defendan sepatutnya memulakan prosiding dengan memfailkan saman untuk arahan di bawah A 25 k 1(4) KMT, sejurus selepas plidingnya dianggap teratur.

C (3) Pada masa lampiran 20 difailkan, kelewatan tersebut tidak lagi berterusan. Defendan dengan memfailkan Borang 63 pada April 2003, telah memulakan semula suatu tindakan yang terdiam sekian lama. Sememangnya, selepas Borang 63 difailkan, tetapi sebelum defendan memfailkan tindakan semasanya pada September 2003, telah wujud dua perbicaraan pengurusan kes pada 3 Jun dan 15 Ogos 2003. Defendan juga bersalah dalam lewat memfailkan lampiran 20 dengan ketiadaan apa-apa penjelasan (lihat perenggan 22 dan 23)

D (4) Defendan tidak menjelaskan tahap prejudis yang dialaminya, melalui saman dalam kamar ataupun affidavitnya, disebabkan oleh kelewatan plaintif. Sebaliknya, plaintif telah menyatakan di dalam affidavitnya bahawa dia akan mengalami kesan prejudis yang amat besar sekiranya injunksi tersebut diketepikan dalam mana taraf kehidupan 36 pekerja-pekerjanya bergantung kepada bekalan elektrik yang berterusan (lihat perenggan 24).]

E

Notes

F For cases on interlocutory injunction, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2707–2794.

For interlocutory injunctions generally, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) para [10.5–027].

Cases referred to

G *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1990] 3 MLJ 481 (refd)

Daisystar Limited v Town & Country Building Society & Anor; Town & Country Building Society v Daisystar Limited & Anor [Unreported] The Times 16Oct 1989 (refd)

Lee Mun Tuck v Tan Chin Kah [1991] 2 MLJ 324 (refd)

H *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178 (refd)

Newsgroup Newspapers Limited v The Mirror Group Newspapers (1986) Ltd [1991] 18 FSR 487 (refd)

I Legislation referred to

Electricity Supply Act 1990 ss 37, 38

Rules of the High Court 1980 O 15 r 2, 25 r 4, 34 r 2

Ravindran (Watson Peters & Mohd Fuad) for the plaintiff.
K Nayagam (Wan Roziahaman with him) (Skrine) for the defendant.

Mohd Hishamudin J:

[1] The plaintiff runs a restaurant in Bangsar, Kuala Lumpur. The defendant company is a supplier of electricity to the public. The plaintiff is one of the consumers of electricity supplied by the defendant. The defendant alleges that the plaintiff had been tampering with the electricity meter (which recorded the amount of electricity consumed by the plaintiff) installed at his restaurant. So, on 11 February 1999 it issued the defendant a notice under s 38 of the Electricity Supply Act 1990. The notice stated that the plaintiff had been tampering with electrical installations in his premises and dishonestly abstracting electricity, and thus had committed an offence under s 37 of the Electricity Supply Act 1990. The plaintiff was further notified that the supply of electricity to his restaurant would be terminated.

[2] The plaintiff immediately applied to the court for an interlocutory injunction to restrain the defendant from disconnecting the electricity supply. On 15 February 1999 it obtained an *ex parte* interlocutory injunction; and subsequently on 19 March 1999, after an *inter parte* hearing, it succeeded in obtaining an *inter parte* interlocutory injunction.

[3] Enclosure 20 (summons in chambers) is an interlocutory application by the defendant to discharge the *inter parte* interlocutory injunction obtained by the plaintiff on 19 March 1999.

[4] The ground for the application is that, since obtaining the interlocutory injunction against the defendant, the plaintiff had not taken any step towards prosecuting his claim under the suit.

[5] I have dismissed the application with costs, and I shall now give my reason.

[6] In this case, the statement of claim was filed on 18 February 1999. In the statement of claim the plaintiff alleges that on 19 November 1998, due to either a defective electricity consumption meter or defective wiring, installed by the defendant at his restaurant, there had been an upsurge of electricity causing substantial damage to his electrical equipments and food supply in the restaurant. He avers that his complaint to the defendant was ignored, and, instead, he was accused by the defendant of tampering with the meter and stealing electricity. As has already been said above, he was issued with a s 38 notice. The plaintiff claims for damages and seeks a declaration to the effect that the notice is null and void.

[7] The statement of defense and counter claim was filed 2 April 1999. In its counter claim the defendant alleges:

- (a) that the plaintiff has failed to settle his electricity bills; and
- (b) that the plaintiff has been tampering with the electricity meter and had been abstracting electricity dishonestly.

- A** [8] The defendant counter claims for the sum of RM107,231.62 as being the amount of unpaid electricity bills.
- [9] On 10 April 2003, the defendant filed Form 63 (in respect of its counter-claim) for case management pursuant to O 34 r 2 of the Rules of the High Court 1980 ('the RHC').
- B** [10] The present encl 20 was filed on 15 September 2003.
- [11] It is important to observe that the defendant in its summons in chambers relies only on one ground, namely, delay on the plaintiff's part in prosecuting its claim.
- C** [12] The defendant cites the following cases:
- (a) *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1990] 3 MLJ 481;
- (b) *Newsgroup Newspapers Limited v The Mirror Group Newspapers (1986) Ltd* [1991] 18 FSR 487;
- D** (c) *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178; and
- (d) *Daisystar Limited v Town & Country Building Society & Anor; Town & Country Building Society v Daisystar Limited & Anor [Unreported]* *The Times* 16 Oct 1989.
- E** [13] In *Bank Bumiputra Malaysia Bhd*, Zakaria Yatim J (as he then was), after referring to *Lloyd's Bowmaker* and *Daisystar*, said (at p 487):
- From the passages quoted above the principle laid down in the two cases may be summarized as follows: A Mareva injunction is no doubt a draconian remedy. It is intended as an adjunct to the action itself, not as a substitute for relief to be obtained on trial. Delay in setting down the action for trial is a most relevant consideration for the court in deciding whether or not a Mareva injunction should be dissolved. The plaintiff who obtained a Mareva injunction is under an obligation to press on for the trial of his action as soon as he can. If he took no active steps to set the case for trial and instead rested on the Mareva injunction, the court would exercise its discretion and dissolve the Mareva injunction. The same principle applies to an Anton Piller.
- F**
- G**
- [14] Although Zakaria Yatim J in the above passage was only referring to Mareva injunction and Anton Piller, in my view, the principle as stated by him therein ought to equally apply to an ordinary interlocutory injunction.
- H** Indeed, in *Newsgroup Newspapers Limited* the court extended the *Bowmaker* principle to ordinary interlocutory injunctions. Hoffman J after referring to *Bowmaker* said (at p 490):
- A Mareva injunction is a particularly onerous form of restriction on the defendant's liberty and to that extent the obligation upon a plaintiff on the action as soon as possible is the stricter, but in principle it seems to me that the considerations to which the learned lords justice referred *also apply to other forms of interlocutory relief which prevent the defendant from doing what he would otherwise be free to do*. A plaintiff who has obtained an interlocutory injunction is not in my view entitled simply to
- I**

rest upon that injunction, to assume, as the plaintiff in this case expressly said he assumed, that in the absence of complaint the defendant is content to treat the injunction as permanent without any further steps having to be taken and to wait until the defendant finds the situation sufficiently burdensome to prompt him to make an application for variation of its terms. (Emphasis added.)

[15] But the authorities have shown that as a matter of principle the court is not obliged to discharge an interlocutory injunction merely by reason of a substantial delay on the part of the party to whom the interlocutory injunction has been granted. Delay or substantial delay is only a factor — albeit an important one — to be taken into account in deciding whether or not an interlocutory injunction ought to be discharged. The court must examine and weigh other considerations as well.

[16] In *Mareva Injunctions and Anton Piller Relief*, 3rd edn by Steven Gee QC (an authority cited by the plaintiff's counsel in his written submission), the learned author states the following principle (at pp 296–297):

However, the court will not always discharge the injunction where there has been a delay, even though the delay has been substantial. The court will take into account all the circumstances of the case including the following:

- (1) whether the delay was the result of a deliberate decision on the part of the plaintiff;
- (2) the length of the delay, and any explanations put forward by the plaintiff (eg the need to obtain legal aid);
- (3) the degree of prejudice liable to be caused to the plaintiff if the injunction is discharged;
- (4) whether the plaintiff has sought to rectify the position and proceed with the action or whether the delay is still continuing at the time of the hearing;
- (5) the degree of prejudice likely to be caused to the defendant as a result of the delay;
- (6) whether the defendant has through his conduct either caused or contributed to it.

[17] In the present case, although it is clear that there has been a long delay on the part of the plaintiff in prosecuting his case, and I find his explanations for the delay unsatisfactory, nevertheless, I am somewhat rather reluctant to discharge the interlocutory injunction.

[18] I so hold for the following reasons.

[19] First, the defendant itself is equally guilty of a delay of four years. The defendant, if it was really serious about delay, need not have to wait for the plaintiff to file Form 63. Since it has a counter claim against the plaintiff, the defendant itself could have moved the proceeding by filing summons for directions under O 25 r 1(4) of the RHC, soon after the pleadings were deemed to have been closed. But since this was not done, the defendant, alternatively, after the coming into force of the amendment to O 34 of the RHC in 21 September 2000 (*vide* PU (A) 342/2000), which introduced case management procedures, could have filed Form 63 (notice for case management) pursuant to O 34 r 2. The defendant need not have to wait until four years to move.

- A** Yet it did not take either of the aforesaid steps — not until April 2003 when it filed Form 63.

Order 34 r 2 of the RHC prescribes:

Notice requiring parties to attend before the judge

- B** 2(1) The plaintiff shall, not later than 14 days after the close of the pleadings under Order 18, rule 20, cause to be issued from the Registry of the Court a notice in Form 63 requiring the parties to the action to attend before the Judge.
- (2) If the plaintiff fails to comply with the provisions of paragraph (1), the Judge may direct the Registry of the Court to issue a notice in Form 64 to the plaintiff to show cause why the action should not be struck out.

- C** [20] True, the above O 34 r 2 refers to the ‘plaintiff’ and not the defendant. However, in the light of the defendant’s counter claim, by reason of O 15 r 2 of the RHC, the defendant in the present case is also a ‘plaintiff’ for the purpose of the above O 34 of the RHC.

- D** [21] In *Lee Mun Tuck v Tan Chin Kah* [1991] 2 MLJ 324, Chao Hick Tin J said (at p 325):

He who comes to court to complain that the other party is guilty of delay and seeks the discretion of the court should not himself be guilty of non-compliance with the rules.

- E** [22] Second, at the time of filing of encl 20, the delay was no longer continuing. The defendant, by filing Form 63 (encl 14) in April 2003, has put the comatose proceeding back in motion. In fact, after the filing of Form 63, but prior to the filing of encl 20 (the present application by the defendant) in September 2003, there had already been two hearings of the case management (encl 14), namely, on 3 June 2003 and on 15 August 2003.

- F** [23] Third, the defendant is guilty of yet another delay: it is remarkable that it took the defendant some five months after the filing of Form 63 (encl 14) for the defendant to then file encl 20. And equally significant the defendant offers no explanation for the five-month delay.

- G** [24] Fourth, the defendant in its summons in chambers and affidavits has not explained the degree of prejudiced suffered by it by reason of the plaintiff’s delay. The gist of the defendant’s complaint was merely the long delay. Indeed, at the two case management hearings on 3 June 2003 and 15 August 2003 the defendant had not at all intimated to the court that it was aggrieved (or had been prejudiced) by the delay on the part of the plaintiff and that it had in mind to make an application to court to discharge the interlocutory injunction.
- H** On the other hand, the plaintiff has deposed in his affidavit at encl 28 that he will be greatly prejudiced if the injunction is discharged in that the livelihood of 36 workers of his are dependent on the uninterrupted supply of electricity.

Application dismissed with costs.

- I** Reported by M Maheswaran